IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

JUDGMENT.

Registered Partnership Firm M/s Umrao Singh Manohar Lal	**vs.**	Registered Partnership Firm M/s Bansi Lal Rameshwar Lal & anr.

S.B. Civil Second Appeal No. 108/1985 against the judgment and decree dated 9.4.1985 passed by the learned Civil Judge, Chittorgarh in Civil Appeal No. 4/83.

Date of Judgment: April 17, 2007.

PRESENT
HON'BLE MR. PRAKASH TATIA,J.

Ms. Manish Shishodia for the appellant.
Mr. Gajendra Mehta for the respondents.

BY THE COURT:

Heard learned counsel for the parties.

The plaintiff filed the suit for recovery of Rs.3412/- against the defendant-respondents. The plaintiff's case is that the plaintiff purchased 150 begs of the wheat from defendant @ 79.25 per quintal through the broker defendant no.2 for which defendant no.2 issued contract form No.673 dated 17.5.1972 on 17.5.1972. The one of the copy of the contract form was given to the plaintiff, another was sent to the seller defendant no.1 and third copy was kept in the contract form book of defendant no.2. It was agreed between the parties that defendant no.1 will load the wheat in the railway wagon and will dispatch in accordance with the directions of the plaintiff. According to the

plaintiff, the wagon at that time was not available and on 8.9.1972 after about almost four months, the plaintiff when enquired, he found that defendant no.1 got the wagon for loading the wheat. He did not load the wheat in the wagon for delivery and ultimately the plaintiff himself went to the place of defendant no.1 on 8.9.1972 and tried to persuade defendant no.1 to give delivery of the wheat but he did not deliver the wheat to the defendant for loading in the railway wagon. According to the plaintiff, the defendant denied delivery of the goods because of the reason that by that time the cost of the wheat raised to Rs.102 per quintal. The plaintiff, therefore, after notice to the defendant, filed the suit for recovery of loss which he suffered.

Defendant no.1 contested the suit and denied any contract for sale of the wheat as alleged by the plaintiff. In the trial court both the parties led evidence. The trial court held that in view of the fact that there is independent person, the defendant no.2, who was broker for the transaction between plaintiff and defendant no.1 and there is written contract issued by defendant no.2, therefore, the plaintiff proved the contract for purchasing of the wheat from defendant no.1. However, the trial court did not grant the decree for full amount of Rs.3411/- but granted decree of Rs.1312.50/- on the ground that on relevant date, the difference in the price was not as claimed by the plaintiff.

Defendant no.1 preferred first appeal against the judgment and decree of the trial court dated 9.11.1981. Defendant no.2 was not aggrieved because of the reason that the suit against defendant no.2 was dismissed by the trial court. The plaintiff submitted the cross-objection under Order 41 Rule 22, C.P.C. for getting the decree against defendant no.2 also as well as against the refusal of the decree by the trial court for whole of the amount. The first appellate court by judgment and decree dated 9.4.1985 allowed the appeal of the defendant-respondents and dismissed the suit of the plaintiff. It appears from the judgment of the first appellate court dated 9.4.1985 that the first appellate court did not decide the cross-objection filed by the plaintiff. Hence this second appeal by the plaintiff on the ground that the first appellate court committed serious error of law in allowing the appeal of defendant no.1 without considering the cross-objection filed by the plaintiff.

The learned counsel for the appellant vehemently submitted that defendant no.2 admitted the transaction and he was broker and he proved the transaction of purchase of the wheat by the plaintiff from defendant no.1 through defendant no.2. There is documentary evidence and that is the contract form which was issued by defendant no.2 and copy of which was given to the plaintiff and another was given to defendant no.1. It is admitted case that defendant no.1 is dealer in the

trade of wheat. In view of the above, the trial court rightly held that the plaintiff purchased the wheat from defendant no.1 through defendant no.2.

The learned counsel for the appellant further submitted that the first appellate court committed serious error of law in not deciding the cross-objection filed by the plaintiff. It is clear from the facts of the case that the plaintiff was entitled to decree against the broker also because of the reason that he himself admitted that he was broker in the transaction and when he himself informed defendant no.1 about the transaction and defendant no.1 if failed to send the goods then defendant no.2 was liable as per the market usages.

Following substantial question of law was framed by this Court on 5.8.1985 while admitting the appeal:

> "*(1) Whether the lower appellate court was right in dismissing the whole suit of the plaintiff without considering the cross-objection of the plaintiff.*"

So far as whether there was a contract of purchase of goods by the plaintiff from defendant no.1 through defendant no.2 is concerned, is a pure question of fact. The first appellate court considered the evidence of both the parties as well as Ex.1- the alleged contract note. The first appellate court after appreciation of evidence held that the plaintiff failed to prove the contract of the parties of the goods from

defendant no.1.

It is worthwhile to mention here that the plaintiff in his own statement admitted that at the time of issuing the contract note, there was no confirmation of defendant no.1 about the transaction. He in cross-examination admitted that he asked the broker-defendant no.2 that whether defendant no.1 confirmed the transaction or not, upon which defendant no.2 told the plaintiff that on confirmation from defendant no.1, the plaintiff will get the builty. Admittedly the plaintiff did not receive the builty. It is also important that the alleged transaction took place on 7.5.1972 and the dispute arose in the month of September, 1972 after almost four months. There is no other evidence by which the transaction is proved except oral evidence. In view of the above when the first appellate court considered the evidence of the parties and thereafter decided the question of fact against the plaintiff about transaction itself, then relief of the plaintiff for getting more amount and relief against defendant no.2 automatically falls to the ground. Therefore, when the basic foundation of the suit of the plaintiff was rejected by the first appellate court, the relief of granting more relief than the relief granted by the trial court does not arise and in view of the above, even if the first appellate court has not decided the cross-objection, which in fact in view of the finding recorded by the first appellate court in the judgment and decree, the

cross-objection automatically became infructuous and no relief could have been granted to the plaintiff-appellant.

In view of the above, the substantial question of law is decided against the appellant and the appeal of the appellant is dismissed.

(PRAKASH TATIA),J.

mlt.